Petition

81-1560

No.

Office - Supreme Court, U.S.
FILED
FEB 16 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANTONIO F. VIGORITO,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF KINGS

RONALD PODOLSKY,
Attorney for Appellant
400 East 20th Street
New York, N.Y. 10009
(212) 460-8218

(12040)

QUESTION PRESENTED

Are public officers who are compelled to sign a waiver of immunity and testify upon pain of loss of position and whose testimony thus compelled is used to procure a conviction for perjury by virtue of that testimony and thereafter incarcerated deprived of liberty without due process of law in violation of the 5th, 6th and 14th Amendments to the United States Constitution?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iv
Opinion Below	1
Jurisdiction	1
Statutes Involved	4
Statement	6
Reasons for Granting Writ	12
Conclusion	21
Appendix A - Letter Denying Leave to Appeal to the Court of Appeals of the State of New York	1a
Appendix B - Motion for Leave to Appeal to the Court of Appeals of the State of New York	3a
Appendix C - People's Opposition to Application for Leave to Appeal to the Court of Appeals of the State of New York	7a
Appendix D - Appellate Division Order Denying Leave to Appeal	9a
Appendix E - Application for Leave to Appeal to the Appellate Division	11a
Appendix F - Opposition to Application for Leave to Appeal to the Appellate Division	13a

Page

Appendix G - Reply to Papers in Opposition to Application for Leave to Appeal to the Appellate Division..... 15a

Appendix H - Order of Booth, J..... 19a

Appendix I - Petition for Writ of Error Coram Nobis..... 24a

Appendix J - Amendment to Petition for Writ of Error Coram Nobis..... 28a

Appendix K - Opposition to Petition for Writ of Error Coram Nobis..... 31a

Appendix L - Reply to Opposition to Petition for Writ of Error Coram Nobis..... 42a

Appendix M - Order of Liebowitz, J... 46a

Appendix N - Petition for Writ Coram Nobis..... 47a

Appendix O - Opposition to Petition for Writ Coram Nobis..... 53a

Appendix P - Excerpts from Transcript - Opening Statement for People..... 65a

Appendix Q - Excerpts from Transcript - Assistant District Attorney Gerald V. Clarke - For People..... 70a

Appendix R - Indictment..... 72a

TABLE OF AUTHORITIES

Page

Brown v. United States, 245 F.2d 549 (8th Cir. 1957)..... 17

Dunn v. United States, 442 U.S. 100..... 21

Gardner v. Broderick, 392 U.S. 278.....4, 12

Garrity v. New Jersey, 385 U.S. 493.....4, 13, 15

Jamison v. Texas, 318 U.S. 413, 414..... 4

Kastigar v. United States, 406 U.S. 441, 453..... 13

New Jersey v. Portash, 440 U.S. 450.....14, 21

People v. DeFeo, 308 NY 595..... 17

People v. Fisher, 4 NY2d 942..... 12

People v. Steuding, 6 NY2d 214..... 17

People v. Tyler, 46 NY2d 251..... 16

Poulos v. New Hampshire, 345 U.S. 395, 402..... 4

United States v. Apfelbaum, 445 U.S. 115.....14, 15, 20, 21

United States v. Dross, 545 F.2d 548 (6th Cir. 1976)..... 19

Page

United States v. Kimball, 117 F. 156 (C.C.S.D.N.Y. 1902)..... 19

United States v. Mandujano, 425 U.S. 564.....17, 18

United States v. Miller, 80 F. Supp. 979..... 19

Statutes:

New York City Charter, Section 903.....3, 4, 12

New York City Criminal Procedure Law, Section 440.10.....5, 12

18 U.S.C. §6002..... 14

28 U.S.C. §1257(2).....3, 12

United States Constitution, Fifth Amendment.....i, 3, 14. 20

United States Constitution, Sixth Amendment.....i, 20

United States Constitution, Fourteenth Amendment.....i, 14, 20

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ANTONIO F. VIGORITO,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

OPINION BELOW

The opinion of Booth, J. (19a) of the Supreme Court of the State of New York, County of Kings, not officially reported, is the only opinion by any court below. Supreme Court, Kings County, is the court possessed of the record.

JURISDICTION

Petitioner, a former New York City

police officer, was convicted on February 16, 1952 of the crime of Perjury in the First Degree and sentenced to prison for two and a half to five years. The indictment charged that on February 23, 1951 he lied to the Kings County Grand Jury which was investigating gambling activities of one Harry Gross in connection with bribery of members of the Police Department (72a). In May 1953, the conviction was affirmed without opinion at 281 AD 1043. On January 20, 1954, while incarcerated in Sing Sing Prison, he pro se filed a petition for writ of error coram nobis (47a), alleging that he was not advised of his right to counsel; that he was never assigned counsel; that he appeared without counsel before the grand jury; that he was not informed that he was a target of the investigation; that he was tricked into signing a waiver of immunity required of public officers and for the purpose of

gaining incriminating information from him. That petition was denied without a hearing on March 19, 1954 (46a).

On February 21, 1981, petitioner brought on the present petition for a writ of error coram nobis (24a) which resulted in the opinion and decision of Booth, J. appealed from. Leave to appeal to the Appellate Division was denied on December 7, 1981 (9a) and leave to appeal to the New York Court of Appeals was denied by letter of December 21, 1981 (1a). The jurisdiction of this Court to review is conferred by 28 U.S.C. 1257(2) in that there was drawn into question below the validity of Section 903 of the New York City Charter on the ground that it was repugnant to the United States Constitution and the decision was in favor of its validity. The section required public officers upon pain of dismissal from their positions to waive the 5th Amendment

privilege against self-incrimination and to testify before the grand jury. That jurisdiction exists in the circumstances of this case is sustained by the following decisions: Jamison v. Texas, 318 U.S. 413, 414; Poulos v. New Hampshire, 345 U.S. 395, 402; Garrity v. New Jersey, 385 U.S. 493 and Gardner v. Broderick, 392 U.S. 278, a case which declared the successor section of the Administrative Code of the City of New York unconstitutional.

STATUTES INVOLVED

New York City Charter Sec. 903 (New York City Charter & Administrative Code Annotated):

> §903. Failure to testify.--If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to

testify or to answer any questions regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency.

New York Criminal Procedure Law Section 440.10 (Motion to Vacate Judgment):

1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

* * *

(h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

2. Notwithstanding the provisions of subdivision one, the court must

deny a motion to vacate a judgment when:

(a) The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue; ***

STATEMENT

Petitioner was a police officer of the City of New York, who alleges that he was denied liberty without due process of law upon his conviction of perjury for his answer to question number 30 on a 23-page financial questionnaire given him concerning his own finances (68a-69a). He had been sworn and given the document to fill out and return two weeks later. He was asked if the answers were true and he stated that they were. He was then excused and testified no further. He was indicted thereafter for the crime of

perjury in the first degree (72a).

As can be seen from excerpts of the prosecuting attorney's opening statement (65a-69a), petitioner was a plain-clothes police officer assigned to suppress gambling; that the grand jury was investigating alleged tie-ins between gamblers and certain police officers; that "as was required by the law of all police officers, he signed what is known as a waiver of immunity required by the Constitution and City Charter" (66a-67a); that petitioner was given a financial questionnaire to determine if he had assets and wealth or property which he could not legitimately account for and that the purpose of the grand jury was to try to trace it, if it could, whether it came from bribes and illegal payments made by gamblers to police officers; that the questionnaire contained 23 pages and that the indictment concerned itself only

with question 30; that question 30 dealt with ownership of real property and it was this written answer which was alleged to be false.

Further, as can be seen from excerpts of the trial testimony of an assistant district attorney, as to the police officers who had been brought before the grand jury, "we were questioning a group of policemen who had been named in Harry Gross' book, on his list, as taking graft, and those were the ones that we had brought in originally in the investigation, the first couple of months. And those policemen would be the ones that were on the police trial, the original police trial where Harry Gross refused to talk, among others.

Q. Does that include this defendant? A. He wasn't on trial, but he was one of the ones that was brought in early in the investigation because he had been

mentioned by Gross as being one of the ones he had given graft to." (70a-71a)

In the affidavit of an Assistant District Attorney in opposition to the original motion for a writ of error coram nobis, it is verified that: he was not advised of the rights to counsel when he appeared before the grand jury because "There is no obligation imposed by the laws of the state of New York upon the District Attorney or the Grand Jury to advise a witness summoned before that body that he has a right to engage counsel"; that, although denying that petitioner was the subject of the grand jury investigation, the grand jury was investigating whether petitioner and other police officers had monies, properties and other assets which could not be accounted for legitimately, and that the waiver of immunity was not extracted through trickery in that he was a witness

and not a subject of the investigation (53a-64a).

As can be discerned from the indictment itself, "then and there and on said occasion the said Grand Jury was investigating and it was material in connection with said investigation, to ascertain and determine among other things, whether one Harry Gross, a bookmaker, and other bookmakers had paid money in the County of Kings to police officers of the City of New York for protection of illegal activities; whether said Harry Gross and other bookmakers in the County of Kings had systematically bribed members of the Police Department of the City of New York who were charged by law and with the duty of suppressing gambling; whether for a consideration police officers of the City of New York were condoning the activities of and permitting said bookmakers to continue their gambling activities

without police interference. On said occasion said Grand Jury was further investigating and it was further material in connection therewith to inquire into the sources of income, financial status, monies, properties and other assets of this defendant and other police officers of the City of New York, and whether this defendant and police officers had assets and wealth which could not be accounted for legitimately." (80a)

It was petitioner's contention below and herein that he was a subject of the investigation as set forth in the very words of the indictment; that the 23-page questionnaire concerned his own activities and not those of others; that he was illegally before the grand jury; that he was there in violation of due process of law; that he was compelled to fill out the questionnaire under an illegal and constitutionally repugnant waiver

of immunity requirement and was denied right to counsel, all resulting in deprivation of his liberty without due process of law and in violation of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, all of which were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court. 28 USC 1257(2).

REASONS FOR GRANTING WRIT

The federal question is substantial. Heretofore, the successor statute of Section 903 of the New York City Charter (Sec. 1123) was declared unconstitutional in 1958. Gardner v. Broderick, supra.*

---

*The original coram nobis antedated Gardner, and hence authorized the present application in the nature of coram nobis under New York City Criminal Procedure Law Sec. 440.10(1)h and (2)a. Nor is the passage of time a disabling factor in presenting the coram nobis petition. See People v. Fisher, 4 NY2d 942 (25 years).

Moreover, any use of the testimony of petitioner in a criminal trial procured by reason of the compulsion wrought by such a section has been declared illegal; Garrity v. New Jersey, supra. Here such testimony was used to convict petitioner of perjury. The use of such testimony gave the prosecution the fruits of unlawful coercion in violation of due process of law.

Can a person, illegally before the grand jury and testifying under the compulsion of an illegal waiver of immunity requirement and without right to counsel, have his testimony thereat used against him for alleged perjury committed? This Court has suggested in Kastigar v. United States, 406 U.S. 441, 453, that the 5th Amendment right against self-incrimination and its requirement of due process of law "prohibits the prosecutorial authorities from using the compelled

testimony in any respect." Further in New Jersey v. Portash, 440 U.S. 450 at 459, the court stated that under the Fifth and Fourteenth Amendments "a defendant's compelled statements...may not be put to any testimonial use whatever against him in a criminal trial....(A)ny criminal trial use against a defendant of his involuntary statement is a denial of due process of law."

In citing these precepts, petitioner is not unmindful of this Court's decision in United States v. Apfelbaum, 445 U.S. 115. That case, however, is not controlling here. In Apfelbaum the defendant had been lawfully conferred with immunity by the district court under 18 U.S.C. §6002. In petitioner's situation, no immunity was conferred. Petitioner was testifying about his own conduct and was not a witness against others. He was illegally compelled to waive immunity and

testify. This distinguishing factor made petitioner's testimony truly compelled in the Garrity sense. This Court observed in Apfelbaum, supra, in footnote 6 at 120 that "properly drawn immunity statutes have long been recognized as valid in this country...And it is likewise well established that one may be prosecuted for making false statements while giving immunized testimony." Petitioner was not giving immunized testimony, but was giving illegally extracted information. The Court observed in the same footnote that a witness asserting his Fifth Amendment privilege under a grant of immunity and consequent compulsion is placed in a dilemma of having to decide whether to answer the question truthfully or falsely, a dilemma he never would have faced had he simply been permitted to remain silent upon invocation of his privilege. Petitioner was not granted immunity nor was

he permitted to remain silent. He was compelled to speak upon pain of loss of employment.

Due process means basic fairness. It should be noted here that petitioner was given an intricate 23-page financial questionnaire which he handed up to the grand jury. He was not recalled to clarify, elucidate upon or given an opportunity to purge himself or confronted with divergent information in the possession of the examiners. In short, it was a perjury trap, an unacceptable tactic, designed to create the crime of perjury. People v. Tyler, 46 NY2d 251. Moreover, he was asked questions about his own financial activities and was asked to be a witness against others. The indictment stated his finances were being investigated. He, therefore, was a target of the inquiry and not a witness and was illegally placed before the grand jury, and

the use of the testimony is proscribed, even for perjury. People v. Steuding, 6 NY2d 214; People v. DeFeo, 308 NY 595.

The circumstances of this case give rise to abuses which deprived petitioner of due process of law and should serve to invalidate his conviction for alleged perjury committed before the grand jury. Although this Court has indicated that abuse of the Fifth Amendment right against self-incrimination does not excuse perjury, United States v. Mandujano, 425 U.S. 564, this Court noted (citing Brown v. United States, 245 F.2d 549 (8th Cir. 1957) noted that there might be abuse of process requiring an entirely different result based on denial of due process of law. Justice Stewart in a concurring opinion summarizing Brown observed that "The perjury prosecution must be barred because of prosecutorial conduct amounting to a denial of due process." Justice

Brennan in Mandujano suggested that government may not in the absence of an intentional and knowing waiver call an indicted defendant before a grand jury and there interrogate him concerning the subject matter of a crime for which he already stands formally charged.

Petitioner contends that at the time he was called to testify under the illegal waiver of immunity he was a virtual defendant in that he had theretofore been named by the bookmaker as having accepted bribes (70a-71a), had been required to waive immunity, had been given a questionnaire respecting his own conduct (a procedure not normally requested of mere witnesses), and was not questioned about conduct of another; and, as the indictment recites, was there at a time when the grand jury was investigating police bribery and "...the sources of income...of this defendant and other police

officers...and whether this defendant and police officers had assets and wealth which could not be accounted for legitimately." (80a-81a)

Under these circumstances, calling petitioner before the grand jury was an abuse of process and all matters flowing therefrom could not be used for any purpose including use of the answers in a perjury prosecution. See United States v. Dross, 545 F.2d 548 (6th Cir. 1976). Although not yet indicted, petitioner was a virtual defendant prior to his appearance, as he was the target of the investigation as was suggested by the indictment itself. The indictment was invalid. See: Mulloney v. United States, 79 F.2d 566 (1st Cir. 1935); United States v. Miller, 80 F. Supp. 979; United States v. Kimball, 117 F. 156 (C.C.S.D.N.Y. 1902).

Where a purpose of calling a person before a grand jury is to question

him without counsel present about a crime for which he has been accused by others, it is an abuse of process which violates both the Fifth Amendment, due process clause, and the Sixth and Fourteenth Amendments. As the proceeding was void, the indictment was illegal. This Court observed in Apfelbaum, supra, "...neither the immunity statute nor the Fifth Amendment precludes the use of respondent's immunized testimony at a subsequent prosecution for making false statements, so long as that testimony conforms to otherwise applicable rules of evidence." Here petitioner's testimony was not immunized testimony, but rather extracted by compulsion of the illegal waiver of immunity requirements of police officers, at a time when he was a virtual defendant without the right to counsel. The use of a person's illegally compelled testimony in a subsequent prosecution for making false

statements is an issue which has not been resolved by Apfelbaum and remains an open one. See especially New Jersey v. Portash, supra, footnote 2 at 459, and Dunn v. United States, 442 U.S. 100, footnote 14, which are believed conclusive of the openness of the issue. It is a question of due process and abuse of process and the tendency of some prosecutors to create the crime of perjury through perjury traps. It is a question of nationwise significance directed to the integrity of the Constitution itself.

CONCLUSION

For all of the foregoing reasons, a Writ of Certiorari should be granted.

Dated: February 18, 1982

Respectfully submitted,

RONALD PODOLSKY
Attorney for Petitioner

Appendix

APPENDICES

APPENDIX A

LETTER DENYING LEAVE TO APPEAL TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATE OF NEW YORK
COURT OF APPEALS

December 21, 1981

Mr. Antonio Vigorito
136 Circle Drive E
Elmont, New York 11003

Re: People v. Antonio Vigorito,
a/k/a Frank Russo
Ind. No. 1764/52

Dear Mr. Vigorito:

Chief Judge Cooke has asked me to reply to your communication of December 16, 1981 by which you seek leave to appeal to the Court of Appeals from an order of Associate Justice David T. Gibbons of the Appellate Division, Second Department dated December 7, 1981 denying your application for permission to appeal to the Appellate Division from an order of Supreme Court, Kings County, entered May 5, 1981.

The Chief Judge has asked me to inform you that, under the applicable provisions of the Criminal Procedure Law (§§440.10, 440.20, 450.15, 450.90, 460.10, 460.15, 460.20), the order of Associate Justice David T. Gibbons is not appealable to the Court of Appeals.

Very truly yours,

/s/ Joseph W. Bellacosa

Joseph W. Bellacosa

APPENDIX B

MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

COURT OF APPEALS
STATE OF NEW YORK

People of the State of New York

Respondent

INDICT 1764/52
APPELL 1768

--Versus--

Antonio Vigorito

Appellant

PURSUANT RULES OF PRACTICE,
COURT OF APPEALS
JURISDICTIONAL STATEMENT

HONORABLE SIRS:

It is the purpose of this appeal, among other things, to determine whether an indictment procured under color of law, Sec. 903, N.Y. City Charter, since declared repugnant to the Constitution of the United States, should be found to be

in violation of the defendant's Constitutional rights, both Federal and N.Y. State.

It is the purpose of this appeal to determine whether an indictment so found, may be the subject of a motion to vacate judgment of conviction at any time.

It is the purpose of this appeal to determine whether lapse of time, long or otherwise, between judgment and motion to vacate judgment precludes institution of such motion.

To the extent that above questions are Constitutional in nature and content, jurisdiction to determine is vested in the Court of Appeals. Proof lies in Gardiner V. Broderick, 88 S Ct 1913 and in People V. Steuding, 180 N Y S 2nd 166. These cases passed through the Court of Appeals, among others, on substantially the same grounds.

The appellant in People V. Antonio

Vigorito, Indictment #1764/52, Appellant #1768, appeals from an order of the Appellant Division, Second Department finally denying a petition for leave to appeal to the Appellant Division, Second Department from an order of the Supreme Court, Kings County, denying a motion to vacate judgment in a criminal case.

Service of notice of appeal was made to the Clerk of the Appellant Division, Second Department by the appellant by hand on the _____ day of _____ and served on the District Attorney, Kings County on the _____ day of _____ by hand of the appellant. Service included copy of certificate granting leave to appeal to Court of Appeals entered on the _____ day of _____. Service of order of Appellant Division, Second Department upon the appellant was by first class mail postmarked 10 December 1981 and date of entry was 7 December 1981.

Respondent, the People of N Y State is represented by the Honorable Elizabeth Holzman, District Attorney County of Kings, Municipal Bldg., Boro Hall, Brooklyn, N Y.

Respectfully Submitted

/s/ Antonio Vigorito

Dated _____

Antonio Vigorito, Pro Se
136 Circle Drive E
Elmont, N Y, 11003
516 354 2995

Full set of papers served
to District Attorney, Kings

APPENDIX C

PEOPLE'S OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Office of the
DISTRICT ATTORNEY
Kings County

December 24, 1981

Hon. Joseph W. Bellacosa
Clerk
Court of Appeals
Eagle and Pine Streets
Albany, New York 12207

Re: People v. Vigorito
Application for Leave

Dear Honorable Sir:

On December 16, 1981, the defendant herein submitted to our office a copy of his Application for Leave to Appeal to the Court of Appeals, CPL 460.20(2).

We submit that this application must be denied for the reason set forth in our affirmation.

Thank you.

Sincerely yours,

/s/ Michael Gore

Michael Gore
Assistant District Attorney
(834-5116)

APPENDIX D

APPELLATE DIVISION ORDER DENYING LEAVE TO APPEAL

APPELLATE DIVISION : SUPREME COURT
SECOND JUDICIAL DEPARTMENT

BEFORE: HON. DAVID T. GIBBONS,

Associate Justice.

THE PEOPLE, etc.,

Plaintiff,

v Order

ANTONIO VIGORITO, a/k/a
FRANK RUSSO,

Defendant.

(Ind. No. 1764/52)

In the above entitled cause, the above named Antonio Vigorito, etc., defendant, having moved in this court for leave to appeal thereto from an order of the Supreme Court, Kings County, entered May 5, 1981; and this court, by order

dated December 7, 1981, having referred said application to me for determination;

Now, upon the papers filed in support of said application and the papers filed in opposition or in relation thereto; said application having been duly submitted; and due deliberation having been had thereon, it is

ORDERED that the said application for leave to appeal to this court is hereby denied.

Dated, Brooklyn, N. Y.,
December 7, 1981.

/s/ David T. Gibbons

Hon. David T. Gibbons,
Associate Justice, Appellate Division,
Supreme Court, Second Judicial Department

APPENDIX E

APPLICATION FOR LEAVE TO APPEAL TO THE APPELLATE DIVISION

SUPREME COURT : COUNTY OF KINGS
APPELLATE DIVISION SECOND DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK

V

ANTONIO VIGORITO
1764/52

SIR:

Please take notice that the above named defendant/appellant will make application before the Honorable Cohanlon Jr. Justice of the Supreme Court, Appellate Division Second Department at his chambers at Monroe Place, Brooklyn, N.Y., on the 17th day of April, 1981, at 0930 in the forenoon of that day, for a certificate pursuant to Section 460.15 of the Criminal Procedure Law of the State of New York granting permission to appeal and certify-

ing that above entitled cause involves questions of law and fact which ought to be reviewed by the Appellate Division Second Department, and allowing an appeal to the said court from the order of the Supreme Court, County of Kings, entered on the 24th day of March, 1981, denying a motion by the defendant, made pursuant to Section 440.10 of the Criminal Procedure Law, to vacate a judgment, and from each and every part of said order.

Dated the 3rd day of April, 1981.

Yours respectfully

/s/ Antonio Vigorito

Antonio Vigorito, Pro Se
136 Circle Drive E.
Elmont, New York, 11003
516 354 2995

copy to
District Attorney
County of Kings
Brooklyn, N.Y.

Copy of order to be appealed
attached herewith

APPENDIX F

OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL TO THE APPELLATE DIVISION

APPELLANT ANTONIO VIGORITO - Indictment No. 1764/52

JUDGMENT OF CONVICTION RENDERED (date) February 16, 1953

AFTER TRIAL x PLEA OF GUILTY _____

CRIME Perjury, 1°

IS APPEAL PENDING No

NOTICE OF APPEAL FILED (date) -

WERE THERE PRETRIAL MOTIONS -

STENOGRAPHIC MINUTES _____

NATURE OF MOTION FOR LEAVE TO APPEAL TO THE APPELLATE DIVISION

Date of entry of order On Motion May 5, 1981

Is the present motion opposed Yes

CORAM NOBIS Yes

with stenographic minutes -

without stenographic minutes (without hearing) -

Order entered (date) -

Order Served (date) -

IS APPEAL PENDING
FROM ORDER (this motion)

NOTICE OF APPEAL FILED (date) -

IS THE PRESENT MOTION OPPOSED Yes

ARE THERE OTHER APPEALS PENDING BY THIS DEFENDANT AT THE PRESENT TIME No

REMARKS: FOR THE REASONS STATED IN THE UNDERSIGNED'S AFFIRMATION OF MARCH 4, 1981 (Attached hereto) AND IN JUSTICE BOOTH's MEMORANDUM OPINION OF MARCH 24, 1981 (attached hereto), WE REQUEST THAT LEAVE TO APPEAL BE DENIED.

DATED: September 4, 1981

/s/ Michael Gore
ASSISTANT DISTRICT ATTORNEY
KINGS COUNTY
MICHAEL GORE

cc: ANTONIO VIGORITO
136 Circle Drive East
Elmont, NY 11003

APPENDIX G

REPLY TO PAPERS IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL TO THE APPELLATE DIVISION

NEW YORK SUPREME COURT
APPELLATE DIVISION - SECOND DEPARTMENT

PEOPLE OF THE STATE OF
NEW YORK

Respondent Indictment
1764/52
--Versus-- Pro Se

Antonio Vigorito

Appellant

ANSWER TO OPPOSITION OF THE DISTRICT ATTORNEY TO APPLICATION FOR LEAVE TO APPEAL ORDER

The opposition presented by the District Attorney is that which he presented at the Motion to Vacate Judgment in the Supreme Court.

The petitioner states in answer that time is no bar in attacking a judgment obtained in violation of Constitu-

tional mandates. The District Attorney and the Court below state that the Motion to Vacate Judgment comes too late and without a valid excuse. They further state that the petitioner already took appeal and therefore this matter is closed and/or adjudicated.

The petition has a most valid excuse, To wit:

LACK OF MONEY - None of the lawyers contacted by him would appear free of charge. In fact, no lawyer, except one would appear fee or no fee and that one was too expensive.

LACK OF TIME - The time for taking appeal on the original coram nobis ran out while the petitioner was still incarcerated and in no position to study law in order to perfect one. The clock continued to run while the petitioner found it necessary to work long and arduous hours to supply the daily needs of

his family. Being a "convict" was not a qualification for more rewarding employment then what he was able to obtain

The petitioner refrained from detailing his excuse, not because one did not exist, but because he seeks justice pure and simple, not sympathy.

The District Attorney and the Court below rely on the fact that a routine appeal was taken. However, it is admitted by the District Attorney that the grounds now set forth were not raised in the appeal.

The question presented now: "Does the petitioner have the right to attack a wrongfully obtained judgment at any time?"

Respectfully submitted

/s/ Amtonic Vigorito

Antonio Vigorito, Pro Se
136 Circle Drive East
Elmont, New York, 11003
516 354 2995

Dated 8 Sept. 1981

cc D.A. County Kings

APPENDIX H

ORDER OF BOOTH, J.

MEMORANDUM

SUPREME COURT : KINGS COUNTY (CRIMINAL TERM, COMPLEX C)

THE PEOPLE OF THE STATE OF NEW YORK	By BOOTH, J.
vs.	Dated MARCH 24, 1981
ANTONIO VIGORITO	Indictment Number 1764/52

The defendant, Antonio Vigorito, a/k/a Frank Russo was convicted on February 16, 1953 of the crime of Perjury in the First Degree and sentenced to prison for two and a half to five years.

The charge against the defendant, a former policeman, was that on February 9 and February 23, 1951 he lied to a Kings County Grand Jury which was investigating gambling activities of one Harry Gross in connection with the Police Department.

In May of 1953, the conviction was affirmed in the Appellate Division with no opinion (People v Vigorito, 281 AD 1043). On January 20th, 1954, the defendant filed a petition for a writ of error coram nobis to vacate the judgment upon the grounds that he was not advised of his right to counsel, that he was never assigned counsel; that he appeared without counsel; thqat he was not informed that he was a "target" of a grand jury investigation, and that he was tricked into signing a waiver of immunity for the purpose of being required to incriminate himself. On March 15, 1954, the writ was denied upon the motion papers.

The defendant now moves to vacate the judgment upon the grounds that he was coerced into signing a waiver of immunity; that the questions which were addressed to him were for the purpose of instigating the crime of perjury and that he was denied

due process when his motion to vacate the judgment in 1954 was denied on the papers without a hearing.

LAW

The court has the discretion to deny a motion to vacate a judgment when the grounds raised in the motion have been previously litigated in a state court. Here, the defendant's first two contentions, that he was coerced into signing a waiver of immunity and that the questions addressed to him were designed to set the stage for a perjury prosecution were previously litigated, and as a result denied. This court finds no reason to upset the prior determinations. Even, if defendant was granted immunity, he nevertheless could have been convicted of perjury as a result of giving false testimony to the grand jury (CPL 50.10 subd 1). As for the defendant's contention that the grand jury proceeding was a perjury trap, all

that is necessary to sustain the indictment is that prosecutor has some good faith purpose behind his question (People v Pomerantz, 63 AD2d 457). Here, the grand jury was investigating whether Gross had paid money to police officers, and whether any officers had properties which could not be accounted for legitimately.

The defendant's last contention that the judgment must be vacated because he was not allowed a hearing must also be denied. CPL 440.10 subd (2)(c) states that the court must deny a motion to vacate a judgment when the defendant unjustifiably fails to take or perfect an appeal within the prescribed period. Here, the defendant has not taken any action within 27 years and has not established that his failure to do so was justified.

Therefore, for all the above rea-

sons, the defendant's motion to vacate judgment is denied in all respects.

J. S. C.

APPENDIX I

PETITION FOR WRIT OF ERROR CORAM NOBIS

SUPREME COURT: COUNTY OF KINGS

PEOPLE OF THE STATE OF NEW YORK

VS

Petition for Writ of Error Coram Nobis

ANTONIO VIGORITO

INDICTMENT #1764/52

To; Presiding Judge of the Supreme Court of the County of Kings:

The petition of Antonio Vigorito respectfully shows to this Court and alleges;

1. He is the defendant and petitioner in the above entitled proceedings; that he makes this petition in support of this application for writ of error coram nobis to declare as void and vacate and expunge from the records of this Court, a judgement of conviction entered against him on or about the 16th day of February 1953,

and to have himself produced before and within the jurisdiction of this Court for a full hearing in connection with the aforesaid application.

2. That this application is bround upon the grounds that the petitioner was summoned before the December, 1949, holdover Grand Jury of the County Court of the County of Kings on the 9th day of February, 1951, that the District Attorney and the Grand Jury did then and there deny this petitioner his constitutional rights by means of coercion, abuse of process and under color of law in that the District Attorney and the Grand Jury insisted that this petitioner sign a waiver of immunity under penalty of being summarily dismissed as a civil servant pursuant to the provisions of the Charter of the City of New York; that by this action, the petitioner was denied the opportunity of invoking his right against giving self incrimina-

ting testimony; that the petitioner was made to sign this waiver of immunity before being sworn and before he was given the questionnaire which contained the self-incriminating questions; that the questions so asked of the petitioner indicate that the Grand Jury was in fact and in truth seeking evidence from this petitioner to corroborate allegations of his wrongdoings already in its possession; that the said questionnaire was a ploy to instigate a new crime, namely perjury and not to determine whether this petitioner had knowledge of any crime committed or attempted to be committed by any other person or agency; that the said questionnaire was not designed to expose any confederate or co-conspirator of the petitioner.

3. That this petitioner was again denied, under color of law and abuse of process, due process of law and the equal protec-

tion thereof on or about the 19th day of March 1954 when he was denied a full hearing before the court;

4. This petitioner begs the Court to examine the minutes of the above mentioned Grand Jury and the records and doings of the District Attorney insofar as relates to the petitioner so that it may reach a just and equitable conclusion and give the petitioner a hearing on this matter and whatever other remedy justice may warrant;

5. Together with the above, the petitioner includes the papers filed in the original motion, the indictment, the District Attorney's answer and the denial by the Hon. Judge Leibowitz.

Respectfully submitted
yours, etc.

Antonio Vigorito
136 Circle Drive E
Dated: Elmont, New York 11003

CC: District Attorney
County of Kings

APPENDIX J

AMENDMENT TO PETITION FOR WRIT OF ERROR CORAM NOBIS

SUPREME COURT: COUNTY OF KINGS

PEOPLE OF THE STATE OF NEW YORK

VS

ANTONIO VIGORITO

INDICTMENT #1764/52

AMENDMENT TO PETITION FOR
WRIT OF ERROR CORAM NOBIS
OR
MOTION TO VACATE JUDGEMENT

TO: PRESIDING JUDGE OF THE SUPREME COURT OF THE COUNTY OF KINGS:

The petition of Antonio Vigorito respectfully shows to this court and further alleges;

That this petitioner was further denied due process of law and the equal protection thereof by the Grand Jury and the District Attorney in that the petitioner

was not afforded the opportunity to present his testimony before the Grand Jury in person and verbally but in fact was required to answer questions on a questionnaire which was thereafter processed by the office of the District Attorney; that the questionnaire with answers, now dubbed "testimony", was bandied about among the people and places within the office of the District Attorney; that persons not authorized to be legally in possession of this "testimony" did peruse and study and make recommendation upon its content in violation of the Code of Criminal Procedure which requires utmost secrecy in the dealings of the Grand Jury; that this petitioner at no time appeared or was required to appear in person before the Grand Jury in session and with full quorum to be verbally questioned and examined as to the questions and answers made on the questionnaire or in any other place;

that due to the above mentioned non-occurrence, the Grand Jury could not have properly deliberated the issues and could not have reached an independant conclusion or decision which was properly required of it; that the District Attorney alone reached the decision to indict this petitioner; that the Grand Jury merely "rubber stamped" the District Attorney's recommendation.

Signed /s/ Antonio Vigorito

Feb. 21, 1981

APPENDIX K

OPPOSITION TO PETITION FOR WRIT OF ERROR CORAM NOBIS

SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM: PART C

THE PEOPLE OF THE STATE OF NEW YORK Plaintiff, -against- ANTONIO VIGIROTI a/k/a FRANK RUSSO, Defendant.	AFFIRMATION IN OPPOSITION TO APPLICATION FOR WRIT OF ERROR CORAM NOBIS ETC. Indictment No. 1764/52

MICHAEL GORE, an Assistant District Attorney for the County of Kings, affirms under the penalties of perjury:

This affirmation is submitted in opposition to the above named defendant's motion, dated February 16, 1981, in which he seeks vacatur of his conviction for Perjury, in the First Degree on February 16, 1953 and imposing sentence thereunder,

and for other relief.

This affidavit is made upon information and belief based upon the files and records of the District Attorney of the County of Kings and of the Supreme Court, Kings County.

STATEMENT OF FACTS

Petitioner Antonio Vigorito, a/k/a Frank Russo, was indicted for the crimes of Perjury in the First and Second Degrees in Kings County, Indictment No. 1764/52. He was alleged to have testified falsely under oath before a Grand Jury on February 9 and February 23, 1951. The first count only alleged that the false answers given were material to the investigation, under the penal statutes then in effect.

Petitioner was a police officer in New York City in 1951. In connection with an investigation of the gambling activities of one Harry Gross, the Grand Jury began to investigate corruption in

the form of systematic payoffs to police officers by Gross and others, see Respondent's Brief, Exhibit B, p.5 et seq. enclosed herewith. Petitioner was called before the Grand Jury and asked to sign a waiver of immunity, p.4 Exhibit B. He apparently was given a questionnaire to fill out, one of the questions of which contained an inquiry as to whether he or his wife owned any real estate. He returned to the Grand Jury on February 23, 1951, with the completed questionnaire and again swore to the truth of its contents. The petitioner relied in the negative, and the Grand Jury was presented with evidence that the answer given was false and knowingly given.

At petitioner's trial, the prosecution proved that the defendant was the actual owner of a motel located in Hallandale, Florida, and asked the jury to conclude that petitioner was well aware of

this fact, Exhibit B, p.3-11. The petitioner's defense was based on the testimony of one Ellen Gilmer, his girl friend, who he claimed was the actual owner of the property, Exhibit B, pp.11-26.

Petitioner was convicted of Perjury in the First Degree on January 23, 1953, and sentenced by Judge Samuel Liebowitz to two and a half years to five years imprisonment on February 16, 1953. Petitioner appealed the conviction, submitting a brief, Exhibit A appended hereto, and a reply brief to the response, May 18, 1953. People v. Vigorito, 281 AD 1043, 122 NYS2d 382.

On January 20, 1954, petitioner brought a petition for a writ of error coram nobis alleging a number of similar grounds to those now raised, inter alia, failure to advise him of his right to counsel, failure of a conscious waiver of such a right, failure to inform petitioner

that he was a target of the instant investigation, and violation of his Fifth Amendment right against self-incrimination and Fourteenth Amendment right to Due Process, page one and two of petition of January 20, 1954. On March 19, 1954, Judge Liebowitz denied the writ upon the motion papers of the prosecutor and the defendant.

Respondent is unaware of any subsequent action on this case since Judge Liebowitz's decision in 1954.

ARGUMENT

I. Under the Criminal Procedure Law

Criminal Procedure Law 1.10(2)b states that "post-judgment proceedings" commenced after the CPL's effective date of September 1, 1971 shall be governed by the provisions of CPL, unless such an application would "work injustice" on the particular case. The section itself seems to indicate that the instant petition

would be just such a post-judgment motion falling within the CPL.

CPL 440.10(1) codifies the grounds for a motion to vacate judgment (previously coram nobis), which is the nature of petitioner's motion, see also McKinney's Consolidated Laws Book 11A Criminal Procedure Law, Practice Commentary to Section 440.10 (by [Judge] Richard G. Denzer). Petitioner's grounds may include 440.10(1)b,d, and h.

Since petitioner had his rights of appeal adjudicated in 1953 by the Appellate Division, Second Department*, and failed to raise the grounds now set forth, the Court must deny the instant motion CPL 440.10(2)c. In addition, we note the substantial identity of the instant motion with a previous petition for coram nobis before Judge Liebowitz in

*Respondent is unaware of any attempt to seek leave to appeal in the Court of Appeals.

January 1954. The adverse determination, not appealed by petitioner, further requires denial of this motion, CPL 440.10 (3)b and c.

We submit that where the petitioner has actually had full appellate review (in 1953), has been unsuccessful on his writ of coram nobis on different grounds (in 1954), and seeks no appellate review of his coram nobis writ, it is conclusively the aim of CPL §440.10 to put an end to successive attempts to litigate those issues finally resolved against a petitioner. It is curious indeed that the petitioner would wait 27 years to renew his 1954 coram nobis allegations which if successful, would place an extra burden on the prosecution in re-opening the matters of 1951 which resulted in the instant conviction. See also, Point II of this response.

II. Under the Principles of Coram Nobis and the CCP

If the Court holds that the application of CPL 440 to this petition might work "undue hardship" on Mr. Vigorito by its summary denial provision, then the common-law principles of coram nobis and the predecessor Code of Criminal Procedure would control. We submit, in any event, that the petition must be summarily denied.

a). Under the former Code of Criminal Procedure the defendant's right to a new trial (coram nobis), was limited by statute, CCP 463, et. seq. Indeed, CCP 466 provided that the writ be made before judgment, except in a limited area of cases not herein applicable. We note that the 1954 petition, however, was made within one year of judgment, CCP 465(7) and 466. The prosecutor's reply, by then Assistant District Attorney Koota, dated

January 29, 1954, was wholly on the merits, and we must presume, so was Judge Liebowitz's denial of the motion. Petitioner did not appeal from this order, and we submit it should be conclusive of the matter.

A petition some 27 years or so after judgment is not within the purview of the writ of coram nobis. The remedy of coram nobis was intended as an emergency answer, "to afford a defendant a remedy against injustice when no other avenue of relief is, or ever was, open to him", People v. Howard, 12 NY2d 65, 66 (1962). It may not substitute for an appeal, People v. Howard, supra; People v. Schwsrtz, 12 NY2d 753 (1962). People v. Caminito, 3 NY2d 596 (1958, cert. denied, 357 US 905. Furthermore a conviction of long standing should not be vacated on the basis of a defendant's "speculation" or ancient recollection, People

v. Chait, 7 AD2d 399 (1959). A reopening of this matter would require the plumbing of the recollections of events about 30 years distant, if such people were available. In a case where the defendant had a direct appeal and, in addition, had his timely application for a new trial denied, it is curious indeed that the petitioner comes forward some 27 years later to request a virtual de novo examination of this case at a time when it would be virtually impossible to accurately reconstruct the events in question. Petitioner, of course, does not allege a change in the law to justify his remedy. e.g. CPL 440.10(2)a. In addition, we rely on Judge Koota's affirmation of January 29, 1954.

Respondent submits that the petitioner has had adequate appellate review and a previous writ of error coram nobis by which to raise his contentions at a time when they might have been properly

considered in light of the relatively current proceedings. The emergency measure of coram nobis does not avail him herein, and the judgment of 1953 should not be set aside after so long a hiatus.

CONCLUSION

WHEREFORE, it is requested that the petition in all respects be denied.

Dated: Brooklyn, NY
March 4, 1981

Respectfully submitted,

MICHAEL GORE
Assistant District Attorney
of Counsel
834-5116

Petitioner, Pro Se
Elmont, L.I., N.Y.

APPENDIX L

REPLY TO OPPOSITION TO PETITION
FOR WRIT OF ERROR CORAM NOBIS

SUPREME COURT: COUNTY OF KINGS

PEOPLE OF THE STATE OF NEW YORK

VS

ANTONIO VIGORITO

ANSWER TO OPPOSITION OF THE DISTRICT ATTORNEY OF March 4, 1981

INDICTMENT #1764/52

The petitioner, Antonio Vigorito, in the above titled proceeding submits the following in answer to the opposition presented by the ADA Mr. Michael Gore on March 4, 1981.

The ADA Mr. Michael Gore presents as his argument for denial of the petition for a hearing on Writ of Error Coram Nobis, now known as Motion to Vacate judgment. That due to previous application made and appeal taken, the petition was and stands adjudicated. That due to the fact that

the petitioner failed to pursue the appeal further and that he failed to appeal the original petition at all and that he failed to make further attempt to obtain justice, he has lost the right to make further attempt to obtain justice. In short, Mr Gore claims that laches apply and that without giving this petitioner a full hearing, the court was correct in denying his original motion. He quotes from the CPL which went into effect subsequent to the trial and conviction of this petitioner. Therefor the petitioner will pursue this matter under the CPL now in effect, if it pleases the court. The Criminal Procedure Law now in effect does not alter the Constitution of the U.S. nor the Constitution of New York State nor does it purport to make legal what was illegal process. It does however strengthen the concept of justice, fair play and defendant's rights. This devel-

opment restores my faith and respect for the People and the State and the Court system. Mr. Gore further argues that this petition falls into the category of frivolousness and that it would put the court to much "plumbing of the recollections of events etc." However, the section quoted specifically states that there is no time limit and no bar whatsoever in the making of a motion to vacate judgment of bona fide constitutional rights questions (CPL 1.10 2b.). That the judgement was obtained in violation of a right of the defendant under the Constitution of the U.S. or of the State (440.10 1h). The section of the CPL quoted distinctly states that Coram Nobis is the proper procedure for questions relating to violations of defendant's rights and that the court of original jurisdiction wherein the alleged violations occurred hold full hearing on

the arguements and make proper and just decisions and afford the petitioner due process. P ople v Fisher 1959, 192 NYS 2d 741. "It is the obligation of the Coram Nobis court, where allegations have been presented which come within the ambit of its relief, to inquire into the facts to determine whether or not a deprivation of due process occurred." The petitioner again requests this Court conduct a full hearing on the allegations made in the motion to vacate judgement and that the District Attorney produce the necessary records and minutes for the perusal of the court so that it may reach a just decision and thereby afford this petitioner his day in court.

Dated: March 9, 1981

Copy submitted to District Attorney March 10, 1981 in court, adjourned date.

Respectfully,

/s/ Antonio Vigorito

Antonio Vigorito,
Petitioner, Pro Se

APPENDIX M

ORDER OF LIEBOWITZ, J.

D E C I S I O N

COUNTY COURT : KINGS COUNTY

- - - - - - - - - - - - - - - -x

THE PEOPLE OF THE STATE OF NEW YORK :

-against- : Indictment No. 1764/52

ANTONIO VIGORITO, alias FRANK RUSSO, :

Defendant. :

- - - - - - - - - - - - - - - -x

Motion denied. Submit order. The District Attorney os directed to serve a copy of said order, when signed, together with notice of entry thereof, upon petitioner at the place where he is incarcerated.

Dated: March 12, 1954

/s/ Samuel Liebowitz
C. J.

APPENDIX N

PETITION FOR WRIT CORAM NOBIS

COUNTY COURT : KINGS COUNTY

The People of the State of New York,

Respondents,

- against -

Antonio Vigorito, alias Frank Russo,

Defendant.

PETITION FOR WRIT OF ERROR CORAM NOBIS

To the County Court of the County of Kings:

The petition of Antonio Vigorito respectfully shows to this Court and alleges:

1. That he is the defendant and petitioner in the above entitled proceedings; that he makes this petition in support of this application for a writ of error Coram Nobis to declare as void and to vacate and expunge from the records of this Court a judgement of conviction entered

against him on or about the 16th day of February, 1953, and to have himself produced before and within the jurisdiction of this Court for a full hearing in connection with the aforesaid application.

2. That this application is brought upon the grounds that at the time this petitioner was summoned before the December, 1949, holdover Grand Jury of Kings County on February 9th, 1951, he was not advised of rights to counsel; that he was not informed that the investigation conducted by the said Grand Jury was directed against him; that he was not assigned counsel; that he appeared without counsel; that he never consciously waived his rights to counsel; that the records of this Court are barren of proof that this petitioner was informed of his constitutional rights to be represented by counsel at this stage of the proceedings against him; that the records of this

Court are barren of proof that this petitioner was informed that the proceedings of the said Grand Jury were directed against him.

3. That this petitioner again appeared before the said Grand Jury on the 23rd day of February, 1951; that he again appeared without counsel; that he again was not advised of his rights to counsel; that he again was not informed that the proceedings of the said Grand Jury were directed against him; that he again did not consciously waive his rights to counsel;

4. That this petitioner was summoned before the said Grand Jury in violation of his constitutional rights as provided by the Fifth Amendment of the Constitution of the United States and in violation of his constitutional rights as provided by the Fourteenth Amendment of the Constitution of the United States; that

this petitioner was summoned before the said Grand Jury in violation of his constitutional rights as provided by the Constitution of the State of New York; that this petitioner was compelled to testify against himself in a criminal case; that the oath administered him, if such an oath was administered, was illegal due to his having been compelled to appear before the said Grand Jury; that this petitioner did not appear before the said Grand Jury voluntarily and by his own request; that the waiver of immunity elicited from this petitioner at the time he was summoned is illegal due to the fact that he was compelled to appear; that this waiver of immunity was elicited by trickery and fraud by the Special Assistant District Attorney Clarke in that he advised the petitioner that he was required as a witness in the Harry Gross Investigation, when in fact he was

required as a witness against himself; that neither the District Attorney nor the said Grand Jury ever advised this petitioner that the purpose of his being required to testify was for him to incriminate himself and himself alone; that the portion of the investigation of the said Grand Jury which relates to this petitioner is an investigation solely against this petitioner and no one else.

5. That further proof as to this petitioner's contentions can be gleaned from a reading of the indictment which is filed with the records of this particular case, wherein it clearly states that this petitioner was called before the said Grand Jury as a witness against himself; that further proof is in the testimony of the Foreman of the said Grand Jury at the trial of this petitioner; that further proof is in the minutes of the said Grand Jury whic relate to this petitioners

questioning; that further proof can be found in the testimony of the Special Assistant District Attorney Clarke at the trial of this petitioner.

Wherefore, this petitioner prays that this Court cause to be issued an order vacating and expunging from its records the void judgment rendered against him on or about the 16th day of February, 1953, whereby he was sentenced to two years and six months to five years in State's Prison and or that this Court order and direct that a hearing be had into the facts alleged in this petition and that this petitioner have such further and other relief as justice requires.

Yours, etc.

Respectfully Submitted

/s/ Antonio Vigorito
Antonio Vigorito #113-510
354 Hunter St.
Ossining, New York.

Notarized January 20, 1954.

APPENDIX O

OPPOSITION TO PETITION FOR WRIT CORAM NOBIS

COUNTY COURT : KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs,

-against-

ANTONIO VIGORITO, alias FRANK RUSSO,

Defendant.

STATE OF NEW YORK)
) SS.:
COUNTY OF KINGS)

AARON E. KOOTA, being duly sworn, deposes and says:

I am a Special Assistant District Attorney of Kings County of the State of New York and am familiar with the facts and proceedings heretofore had herein.

This affidavit is submitted in opposition to the petitioner's motion for a Writ of Error Coram Nobis to vacate and

set aside a judgment of conviction of this Court made and entered the 16th day of February, 1953, wherein the defendant was convicted of the crime of Perjury in the First Degree, as set forth in Indictment #1764-1952, and sentenced to the State Prison for a term of two years and six months to five years.

We oppose the request that Judge Leibowitz disqualify himself. No facts whatsoever are set forth in the moving papers which would lend even a semblance of color to the claim that Judge Leibowitz is prejudiced. In defendant's appeal to the Appellate Division, he did not even suggest that he had been denied a fair trial.

To grant this utterly baseless request would in effect be permitting a defendant in a criminal action to submit his case to a judge of his own selection and would do violence to the orderly

practice and procedure of this Court. The customary practice in this Court, as I have been informed and believe, with respect to Writs of Error Coram Nobis is that the matter is referred to the judge who presided over the trial of the case and who sentenced the defendant. (See Frank on Coram Nobis, page 67).

The petitioner's motion is based on the following claims:

a. That he was not advised of the rights to counsel when he was summoned before the Grand Jury in Kings County on two occasions in February, 1951.

b. That the proceedings of the Grand Jury were directed against him and that he was compelled to testify against himself in violation of his constitutional rights.

c. That the waiver of immunity executed by him was illegal because he was compelled to appear as a witness

against himself before the Grand Jury and did not appear voluntarily or at his own request.

d. That the waiver of immunity was elicited by trickery and fraud on the part of a Special Assistant District Attorney of Kings County.

Petitioner claims that he was not advised of his rights to counsel when he was summoned before the Grand Jury in February, 1951. There is no obligation imposed by the laws of the State of New York upon the District Attorney or the Grand Jury to advise a witness summoned before that body that he has the right to engage counsel.

A magistrate or other judicial officer may be required to advise a prospective defendant of his rights, but such duty is specifically imposed by statute (e.g. Code of Criminal Procedure, Section 188, 196 and 308). We have discovered no

cognate obligation upon the Grand Jury or the District Attorney.

Petitioner contends that the investigation of the Grand Jury was directed against him. The Grand Jury in question was investigating, among other things, the alleged activities of criminals, racketeers and gamblers within the County of Kings. More specifically, the Grand Jury was investigating whether one Harry Gross, a bookmaker, had paid money in the County of Kings to police officers of the City of New York for the protection of his illegal activities, and further, whether petitioner and other police officers of the City of New York had monies, properties and other assets which could not be accounted for legitimately. The Grand Jury, therefore, on the occasions when petitioner appeared before it, was investigating gambling, conspiracy and bribery. The petitioner

appeared in this investigation as a witness, not as a prospective defendant, and he was not summoned as a witness against himself or as a person whom the Grand Jury sought to indict.

Even if we assume (which we do not) the truth of petitioner's claims that his status before the Grand Jury was that of a prospective defendant, petitioner's summons before the Grand Jury was not illegal or in violation of any of his constitutional rights.

The Penal Law of the State of New York at the time petitioner appeared before said Grand Jury granted immunity to any witness on an inquiry into the crimes of bribery, Penal Law, Section 381; conspiracy, Penal Law, Section 584; and gambling, Penal Law, Section 996.

The immunity statutes in effect, at the time of petitioner's appearance before the Grand Jury, created no distinc-

tion in the legal status between a person who is subpoenaed in the strict capacity of a witness and one who is summoned as a prospective defendant in an investigation directed against him. (People ex rel Coyle v. Truesdell, 259 App. Div., 282, 284) Both (witness and prospective defendant) were required to testify and were protected in their constitutional rights in that their testimony could not be used against them if such testimony revealed the commission of a crime or revealed a clue thereto, unless, of course, a waiver of immunity was executed.

We are fortified in these conclusions by two cases arising out of this very Grand Jury investigation. Matter of the Grand Jury of the County of _____ (Nicastro-Chedeayne, 170 App. Div. 915, aff'd without opinion 303 N. Y. 983; People ex rel Hofsaes v. Warden, 277 App. Div. 398, aff'd on the point herein

involved 302 N. Y. 403.

It is inescapable, therefore, that the petitioner in whatever capacity he appeared before the Grand Jury in question, was protected in his constitutional rights as to self incrimination by the immunity statutes. The cases note that in some instances there may be different legal consequences where an investigation is directed against the witness himself from that where the witness is testifying against others, but this differentiation applies in only those instances where a Grand Jury is investigating crimes as to which there is not an immunity statute. But where immunity statutes exist, such as in the cases of gambling, bribery and conspiracy which this Grand Jury was investigating, then there is no legal difference in the status of a witness. In the latter case, it makes no difference whether he is a person

whom the Grand Jury is seeking to indict or whether he is merely testifying against others. In either case, he is granted complete immunity and he must testify. Once testifying before the Grand Jury, he must, of course, tell the truth. He is not accorded the privilege of committing perjury because he may be the subject of the investigation.

Petitioner's third claim is that his execution of a waiver of immunity was illegal and obtained by trickery and fraud on the part of a Special Assistant District Attorney of Kings County. Petitioner claims that the Special Assistant District Attorney advised him that he was required before the Grand Jury as a witness in the Harry Gross investigation, whereas in reality, he was a witness in an investigation against himself.

Petitioner does not claim that he did not understand the nature and implica-

tions of the waiver of immunity. He merely claims that the waiver was not effective because of alleged trickery and because the Grand Jury investigation was directed against him.

We have shown above, and the indictment and record of petitioner's trial so reveal, that the nature of the investigation by this Grand Jury was into the activities of criminals, racketeers and gamblers, more specifically, the operations of the Harry Gross bookmaking empire and its connections with the Police Department of the City of New York. The investigation was not against petitioner. He was one of many hundreds of similar witnesses called in this investigation. The Grand Jury was an investigative or factfinding body.

The indictment and conviction of petitioner arose out of perjured testimony he gave before the Grand Jury. He was not

indicted nor convicted for the commission of some prior crime that his testimony before the Grand Jury revealed or to which it furnished a clue. It is fundamental that no person, be he a witness or a prospective defendant, is immune from punishment for the crime of perjury committed in testifying before a Grand Jury. Whether petitioner's waiver was legal or illegal had no bearing on his indictment for the perjury since even if petitioner had testified without any waiver of immunity, he would still have been indictable for the perjury committed before that body.

Moreover, the question of illegality of the waiver of immunity was a question which could have been raised at his trial. He failed to do this either during the trial or upon his subsequent appeal to the Appellate Division. Petitioner cannot now be heard to raise this

question through the medium of Coram Nobis. Such a writ has never been permitted for that purpose.

It is evident from the foregoing that only questions of law are raised. Therefore, it does not appear necessary that any testimony be taken and petitioner's request for a hearing to inquire into the facts alleged in the petition should be denied (See People v. Oddo, 300 N. Y., 649).

WHEREFORE, I respectfully submit that the petition should be dismissed.

/s/ Aaron J. Koota

Notarized January 29, 1954.

APPENDIX P

EXCERPTS FROM TRANSCRIPT - OPENING STATEMENT FOR PEOPLE

[196] The Grand Jury thereafter began to call various plainclothes officers who had at one time or another worked as plainclothesmen in the localities in which Gross and other bookmakers had operated in this County. And when it was required, in other counties, where it was related to the operation of the bookmakers who had been called before the Grand Jury.

Thereafter, the Grand Jury directed, and it became part of the investigation of the Grand Jury, to distribute what was known as a questionnaire, a financial questionnaire to various plain-
[198] clothes officers, amongst which were this defendant, Vigorito. The purpose of this questionnaire, in the investigation of this Grand Jury, was to deter-

mine a number of things. It was to determine, amongst other things, whether or not this defendant--and we are talking now about this defendant--had assets and wealth or property, moneys for which he could not legitimately account, and to try and trace, if it could--that was the purpose of the Grand Jury and its investigation--where this money, if there was money or assets or wealth not legitimately accounted for, where did it come from? Did it come from bribes and illegal pay-
[199] ments made by bookmakers to plainclothesmen? Because that was the purpose of the Grand Jury's investigation. And so there came about this distribution of the questionnaire.

This defendant, on February 9, 1951, then a member of the Police Department of the City of New York, was called before the Grand Jury. As was required by law of all public officers, he signed

what is known as a waiver of immunity, required by the Constitution and the City [200] Charter. He was duly sworn before the Grand Jury as a witness, sworn to tell the truth with respect to all matters of which he would be inquired of, and at that time was given a questionnaire, which will be introduced in evidence in this case, and directed to return this questionnaire completed, I think, some two weeks hence.

Thereafter, and on the 23rd day of February, 1951, pursuant to the direction of the Grand Jury, the defendant returned and was recalled as a witness, not again sworn, because he had been previously sworn and was still under oath. [201] When he returned the questionnaire, which was marked as an exhibit in the Grand Jury and became part of the proceedings there, he was asked whether the questions or the answers to the questions con-

tained in the 23 pages of this questionnaire are true, and the defendant answered "Yes, sir." He had previously acknowledged in the testimony that he had signed the questionnaire and acknowledged its truthfulness before a notary public, and he verified his signature before said notary public, and this questionnaire, with his verified signature and his acknowledgement, were all made part of [202] the exhibit before the Grand Jury.

Now, we are concerned in this case with but one question in that questionnaire and with but one answer, and none other. We are not trying this defendant on any of the other matters which are referred to in the questionnaire, and they do not concern you gentlemen of the jury. However, in the exhibit before the Grand Jury--and it will be an exhibit here --question 30 of the questionnaire, to [203] which this defendant testified he

had answered truthfully under oath in the Grand Jury, was the question 30A: "Do you, your wife or any of your dependents now own any real estate?" And this was asked of the defendant on the 23rd day of February, 1951; and it is important to keep that date in mind.

* * *

APPENDIX Q

EXCERPTS FROM TRANSCRIPT - ASSISTANT DISTRICT ATTORNEY GERALD V. CLARKE - FOR PEOPLE

[556] * * *

Q. Can you describe any of the other persons that appeared with questionnaires on the 23rd of February? A. I can't des-
[557] cribe them by name, but I can tell you the group. At that time that the defendant was brought into the Grand Jury, as long as you asked the question, we were questioning a group of policemen who had been named in Harry Gross' book, on his list, as taking graft, and those were the ones that we had brought in originally in the investigation, the first couple of months. And those policemen would be the ones that were on the police trial, the original police trial, where Harry Gross refused to talk, among others.
[558] Q. Does that include this defend-

ant? A. He wasn't on the trial, but he was one of the ones that was brought in early in the investigation, because he had been mentioned by Gross as being one of the ones he had given graft to.

Q. Are you sure of that, Mr. Clarke? A. I am sure of that. I investigated the case.

Q. Are you sure of that, Mr. Clarke? A. I certainly am.

* * *

APPENDIX R

INDICTMENT

COUNTY COURT
OF THE COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK

Plaintiffs

against

ANTONIO F. VIGORITO, alias "FRANK RUSSO",

Defendant

FIRST COUNT

The Grand Jury of the County of Kings, by this indictment, accuse the defendant of the crime of PERJURY IN THE FIRST DEGREE committed as follows:

The Grand Jury of the County of Kings, by this indictment, accuse the defendant of the crime of PERJURY IN THE FIRST DEGREE, committed as follows: During the month of December 1949 the Grand

Jury duly impanelled for the month of December 1949 in the County Court, Kings County, Part VI of said Court, was engaged in a certain investigation and inquiry for the purpose, among other things, to investigate "the alleged activities of criminals, racketeers and gamblers within the County of Kings and every and all matters affecting and appertaining thereto"; thereafter by various orders of the County Court, Kings County, duly entered in the office of the Clerk of the County of Kings thereof, the said December 1949 Grand Jury and the December 1949 Part VI Term of said County Court was extended from time to time continuously to the 31st day of December, 1952, to permit said Grand Jury to complete the aforesaid investigation pending before that body.

On or about the 23rd day of February, 1951, defendant was an officer of

the Police Department of the City of New York and at various times had exercised the duties of a plainclothesman in various divisions of the Police Department of the City of New York, and as such plainclothesman was charged specifically with the duties of enforcing laws against gambling and vice.

On the 9th day of February, 1951, the said defendant was called as a witness in said investigation and duly appeared before said Grand Jury in the County of Kings. Said defendant was thereupon duly sworn to tell the truth, the whole truth and nothing but the truth by the Foreman of said Grand Jury, who was duly authorized by law to administer an oath, the same being an occasion in which an oath is required by law and lawfully may be administered. Then and there and on said occasion the said Grand Jury was investigating, and it was material in connection with said

investigation, to ascertain and determine among other things, whether one Harry Gross, a bookmaker, and other bookmakers had paid money in the County of Kings to police officers of the City of New York for the protection of illegal activities; whether said Harry Gross and other bookmakers in the County of Kings had systematically bribed members of the Police Department of the City of New York, who were charged by law with the duty of suppressing gambling; whether for a consideration police officers of the City of New York were condoning the activities of and permitting said bookmakers to continue their gambling activities without police interference. On said occasion said Grand Jury was further investigating and it was further material in connection therewith to inquire into the sources of income, financial status, monies, properties and other assets of this defendant

and other police officers of the City of New York and whether this defendant and police officers had assets and wealth which could not be accounted for legitimately.

The said defendant upon such occasion on the 9th day of February, 1951, and having been duly sworn as aforesaid, did wilfully and knowingly testify falsely that all the answers to the questions contained in a certain questionnaire theretofore submitted to him were true; that among the said questions contained on said questionnnaire was the following:

> "Do you, your wife, or any of your dependents, now own any real estate?"

That the defendant answered "No" to said question. The said answer was false. And in truth and in fact the defendant on said date did own certain real estate in the County of Broward, Hallandale, in the

State of Florida as the defendant then and there well knew.

The testimony given by said defendant before said Grand Jury as hereinabove set forth was false and the defendant well knew that the testimony then and there given by him was false and was given wilfully and knowingly, and the said questionnaire was used by the Grand Jury in connection with said investigation, and said testimony was material in connection with said investigation by said Grand Jury.

And so the Grand Jury aforesaid say that the said defendant in the manner and form aforesaid did knowingly, wilfully and corruptly commit the crime of perjury in the First Degree against the form of the statute in such case made and provided and against the peace and dignity of the People of the State of New York.

SECOND COUNT

The Grand Jury of the County of Kings, by this indictment, accuse the defendant of the crime of PERJURY IN THE SECOND DEGREE committed as follows:

The Grand Jury of the County of Kings, by this indictment, accuse the defendant of the crime of Perjury in the Second Degree, committed as follows: During the month of December, 1949, the Grand Jury duly impanelled for the month of December 1949 in the County Court, Kings County, Part VI of said Court, was engaged in a certain investigation and inquiry for the purpose, among other things, to investigate "the alleged activities of criminals, racketeers and gamblers within the County of Kings and every and all matters affecting and appertaining thereto"; thereafter by various orders of the County Court, Kings County, duly entered in the office of the Clerk of the County of Kings

thereof, the said December 1949 Grand Jury and the December 1949 Part VI Term of said County Court was extended from time to time continuously to the 31st day of December, 1952, to permit said Grand Jury to complete the aforesaid investigation pending before that body.

On or about the 23rd day of February, 1951, defendant was an officer of the Police Department of the City of New York and at various times had exercised the duties of a plainclothesman in various divisions of the Police Department of the City of New York, and as such plainclothesman was charged specifically with the duties of enforcing laws against gambling and vice.

On the 23rd day of February, 1951, the said defendant was called as a witness in said investigation and duly appeared before said Grand Jury in the County of Kings. Said defendant was thereupon duly

sworn to tell the truth, the whole truth and nothing but the truth by the Foreman of said Grand Jury, who was duly authorized by law to administer an oath, the same being an occasion in which an oath is required by law and lawfully may be administered. Then and there and on said occasion the said Grand Jury was investigating to ascertain and determine among other things, whether one Harry Gross, a bookmaker, and other bookmakers had paid money in the County of Kings to police officers of the City of New York for the protection of illegal activities; whether said Harry Gross and other bookmakers in the County of Kings had systematically bribed members of the Police Department of the City of New York, who were charged by law with the duty of suppressing gambling; whether for a consideration police officers of the City of New York were condoning the activities of and permitting said

bookmakers to continue their gambling activities without police interference. On said occasion said Grand Jury was further investigating into the sources of income, financial status, monies, properties and other assets of this defendant and other police officers of the City of New York and whether this defendant and police officers had assets and wealth which could not be accounted for legitimately.

The said defendant upon such occasion on the 23rd day of February, 1951, and having been duly sworn as aforesaid, did wilfully and knowingly testify falsely that all the answers to the questions contained in a certain questionnaire theretofore submitted to him were true; that among the said questions contained on said questionnaire was the following:

"Do you, your wife, of any of your dependents, now own any real estate?"

That the defendant answered "No" to said question. The said answer was false. And in truth and in fact the defendant on said date did own certain real estate in the County of Broward, Hallandale, in the State of Florida as the defendant then and there well knew.

The testimony given by said defendant before said Grand Jury as hereinabove set forth was false and the defendant well knew that the testimony then and there given by him was false and was given wilfully and knowingly, and the said questionnaire was used by the Grand Jury in connection with said investigation.

And so the Grand Jury aforesaid did say that the said defendant in the manner and form aforesaid did knowingly, wilfully and corruptly commit the crime of Perjury in the Second Degree against the form of the statute in such case made and provided and against the peace and

dignity of the People of the State of New York.

/s/ Miles McDonald
District Attorney
Kings County.

Opposition

Supreme Court, U.S.
FILED
MAR 25 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1560

IN THE

Supreme Court of the United States

1981 Term

ANTONIO VIGORITO,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIEF FOR RESPONDENT

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BARBARA D. UNDERWOOD
MICHAEL GORE
Assistant District Attorneys
Of Counsel

Issue Presented

Whether petitioner, who was convicted of perjury in 1952, may challenge his conviction some 30 years later on the ground that his perjurious testimony was given pursuant to a waiver of immunity that was unconstitutionally coerced, due to an invalid state statute, which he failed to challenge on his direct appeal, and in the lower courts on *coram nobis*.

TABLE OF CONTENTS

PAGE

Issue Presented i

Table of Authorities ..... ii-iii

Statement of Facts 1

ARGUMENT:

Reasons For Denying The Writ 3

A. Petitioner's Perjury Conviction Is Constitutionally Valid 4

B. There Is No Jurisdictional Basis For *Certiorari* 5

C. New York's Denial Of The *Coram Nobis* Writ Rests On Adequate State Grounds ... 7

CONCLUSION:

For The Aforementioned Reasons, It Is Requested That The Petition For *Certiorari* Be Denied .. 10

TABLE OF AUTHORITIES

Cupp v. *Naughten*, 414 U.S. 141 (1973) 8

Gardner v. *Broderick*, 392 U.S. 273 (1968) 4n, 9

Garrity v. *New Jersey*, 385 U.S. 493 (1965) 6

Harris v. *New York*, 401 U.S. 227 (1971) 4

Henry v. *Mississippi*, 379 U.S. 443 (1965) 8

Kastigar v. *United States*, 406 U.S. 441 (1972) 5

McNabb v. *United States*, 318 U.S. 332 (1943) 8

Monks v. *New Jersey*, 398 U.S. 71 (1970) 6

New Jersey v. *Portash*, 448 U.S. 450 (1979) 5

People v. *Vigorito*, 281 A.D. 1043 (1953) 2

PAGE

Tacon v. *Arizona*, 410 U.S. 351 (1973) 6

United States ex rel. Bryant v. *Zimmerman*, 278 U.S. 63 (1928) 6

United States v. *Apfelbaum*, 445 U.S. 115 (1980) .. 4

United States v. *Bryson*, 396 U.S. 64 (1969) 4

United States v. *Mandujano*, 425 U.S. 564 (1976) .. 4

STATUTES:

New York City Charter § 903 ..... 2n, 3, 4n, 6

New York Code of Criminal Procedure

§ 517 ..... 2n

§ 519 ..... 2n

New York Criminal Procedure Law

§ 50.10 ..... 2, 4

§ 440.10 8

§ 440.10(2)(c) 8, 9

§ 440.10(3)(b) 9

§ 440.10(3)(c) 9

Article 450 ..... 2n, 8

Article 470 8

28 U.S.C. § 1257(2) 3, 5, 6

28 U.S.C. § 1257(3) 6

U.S. Constitution

Amendment V 3

Amendment VI 3

Amendment XIV 3

No. 81-1560

IN THE

Supreme Court of the United States

1981 Term

ANTONIO VIGORITO,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT

Statement of Facts

On February 9, 1951, Petitioner Antonio Vigorito, a New York City policeman, appeared before a Kings County Grand Jury investigating corruption involving bribes allegedly paid by a confessed bookmaker. Petitioner was given a questionnaire, which he submitted to the grand jury under oath two weeks later. Subsequently, petitioner was indicted for Perjury in the First Degree, for making knowingly false statements relating to his ownership of property. He was duly convicted after trial on February 16, 1952, and sentenced to two and a half to five years in jail. His conviction was affirmed on

direct appeal * by the State Appellate Division, *People* v. *Vigorito*, 281 A.D. 1043 (2d Dept. 1953).

Shortly after his unsuccessful appeal, the petitioner brought a writ of error *coram nobis*, in January of 1954. In that writ, petitioner for the first time protested his appearance before the Grand Jury, claiming that his Constitutional rights had been violated, that he had been without counsel, and that his appearance was elicited by "trickery and fraud" in that the Grand Jury was investigating solely the petitioner. *See* Appellant's Appendix N, pp. 48a-51a. This writ was denied on March 12, 1954 by State Supreme Court Justice Samuel Liebowitz, the trial judge. Petitioner made no attempt to seek to appeal that denial to the Appellate Division, or to the New York Court of Appeals.**

Some 27 years later, long after the expiration of his sentence, petitioner sought a further writ of *coram nobis*. For the first time, petitioner mentioned the New York City Charter statute requiring public officials, such as petitioner, to waive immunity before the Grand Jury. However, petitioner did not mention the constitutional invalidity of that statute. On March 24, 1981, State Supreme Court Justice William Booth denied the petition. In a short memorandum opinion, the Court relied on the previous denial of his claims in regard to the waiver of immunity, his inexcusable failure to take an appeal in the ensuing twenty-seven year period, and the ultimate validity of the perjury conviction, citing New York Criminal Procedure Law § 50.10(1). An application to

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* Petitioner was represented by counsel therein. At that time he did not raise the constitutionality of the City Charter § 903 requiring his waiver of immunity before the grand jury.

** New York Code of Criminal Procedure §§ 517 and 519 gave defendants the right to take further appeals. The N.Y. Criminal Procedure Law Article 450 replaced these sections in 1971.

appeal this denial to the State Appellate Division was itself denied December 7, 1981. A final "motion" for Leave to Appeal the latter denial * was made to the Court of Appeals, but this was summarily dismissed by the Clerk of the Court in view of the non-reviewability of the Appellate Division's denial, *see* Appellant's Appendix A.

Petitioner now requests a writ of *certiorari*, allegedly under 28 U.S.C. § 1257(2), claiming that his original appearance in 1951 before the Kings County Grand Jury was unconstitutionally compelled by New York City Charter § 903, and that his conviction for perjury was therefore obtained in violation of his Federal Constitutional rights under the Fifth, Sixth and Fourteenth Amendments. This claim, not presented on petitioner's direct appeal or on his 1954 *coram nobis* application nor in the 27 years since that proceeding, has never been adjudicated by the New York State Courts.

ARGUMENT

Reasons For Denying The Writ

Petitioner was convicted of Perjury in the First Degree for lying to a Kings County Grand Jury on February 23, 1951. His conviction was affirmed on appeal by the Appellate Division, Second Department. No further appeal was taken to the State's highest court, the Court of Appeals. The Trial Court denied a writ of error, *coram nobis* on January 20, 1954. No further action was taken on this appeal until 27 years later, when petitioner brought this unsuccessful petition for

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* Strangely, this "motion" made the first unambiguous mention of the possible unconstitutionality of the applicable City Charter section.

error *coram nobis*. Over thirty years have elapsed since the commission of the crime.

A. Petitioner's Perjury Conviction is Constitutionally Valid

Petitioner appeared in the Kings County Grand Jury in 1951, signed a waiver of immunity from prosecution, and gave "testimony" through a sworn questionnaire. A false answer to a question about the property he owned led to his conviction for perjury. At no time prior to his conviction, nor in his direct appeal did petitioner challenge the constitutionality of the "waiver of immunity" section.* Petitioner's argument would have more weight if he had been convicted of a crime committed prior to his Grand Jury appearance, on the basis of testimony improperly obtained through his allegedly improper waiver of immunity. But that is not what happened here. He was convicted of perjury, for tesfitying falsely in that Grand Jury. A person may be prosecuted for perjury even if he has been granted immunity from other prosecution. In *United States* v. *Mandujano*, 425 U.S. 564, 576 (1973), this Court found that commission of perjury is not protected by the Constitution:

> Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings.

Accord, United States v. *Apfelbaum*, 445 U.S. 115 (1980), *United States* v. *Bryson*, 396 U.S. 64 (1969), *Harris* v. *New York*, 401 U.S. 222 (1971); *see* New York Criminal Procedure Law § 50.10. Whether or not the petitioner was entitled to immunity in exchange for his testimony

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* As petitioner's brief points out, the successor to N.Y.C. Charter § 903 was found unconstitutional in *Gardner* v. *Broderick*, 392 U.S. 273 (1968), some 17 years after petitioner appeared before the Grand Jury. That civil suit, involving an actual refusal to waive immunity, under the section, merely requested a reinstatement of the plaintiff's civil service benefits.

in 1951 has no bearing on his conviction for perjury herein. Petitioner's reliance on *New Jersey* v. *Portash*, 440 U.S. 450 (1979), dealing with the use of "coerced" and hence involuntary testimony obtained by guarantee of immunity for impeachment purposes, and *Kastigar* v. *United States*, 406 U.S. 441 (1972), upholding a judgment of civil contempt after a grant of immunity, is misplaced. Neither of these cases, nor any other, changes the principles supporting the validity of perjury convictions under these circumstances. Petitioner's state conviction for perjury, arising out of his non-immunized grand jury appearance, is not invalid under Federal Constitutional principles enunciated by this Court, and should not be the basis for a writ of *certiorari* in this case.

B. There Is No Jurisdictional Basis For Certiorari

Petitioner claims that this Court has jurisdiction under 28 U.S.C. § 1257(2). This section permits the Supreme Court to review final judgments of a state's highest court, by appeal:

> . . . where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Petitioner has designated his application as a "petition for *certiorari*," although relying on this subdivision. That provision authorizes review by *appeal* rather than *certiorari*. Treating this as an appeal under 1257(2), the application must fail.

In neither the instant petition for writ of error *coram nobis* (Petitioner's Appendix I), nor his application to the Appellate Division for Leave to Appeal (Petitioner's

Appendix E), did the petitioner contend that Section 903 of the New York City Charter, cited at pp. 4-5 of his *certiorari* petition, was unconstitutional.* Therefore, Justice Booth's opinion accompanying his denial of *coram nobis* (Petitioner's Appendix H) makes no mention of such a Constitutional question. Since the petitioner never properly questioned the validity of New York City Charter § 903, and the courts of New York never upheld the statute herein, there is no jurisdiction under 28 U.S.C. § 1257(2).

Nonetheless, this Court may elect to treat this "appeal" as a true petition for *certiorari*, 28 U.S.C. § 1257(3), as it did in *Garrity* v. *New Jersey*, 385 U.S. 493 (1966), and evaluate the petition for review in that light. For review by *certiorari*, it is only necessary that the validity of a "state statute is drawn into question on the ground of its being repugnant to the Constitution," without regard to the state decision on the point. Even this lesser standard will not furnish jurisdiction herein because the lower court proceedings never raised the point of the validity of the "waiver of immunity" section, N.Y.C. Charter § 903. The constitutionality of a state statute may not be raised for the first time in this Court when the state courts have had no opportunity to pass upon the question, *Tacon* v. *Arizona*, 410 U.S. 351 (1973), *Monks* v. *New Jersey*, 398 U.S. 71 (1970). In *United States ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928), this Court observed:

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* In his application for leave to the Court of Appeals, petitioner first raised this issue (Petitioner's Appendix B). However, as the letter from the Clerk of Court, Mr. Bellacosa, indicates, the previous decision of the Appellate Division was not appealable (Petitioner's Appendix A). Such a procedure scarcely satisfies the predicate for jurisdiction.

> No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court *with fair precision and in due time.*

[Emphasis supplied]. Petitioner Vigorito failed to raise the point set forth in his *certiorari* petition either to the State Supreme Court (Justice Booth) or to the State Appellate Division. Nor could his mention of the ground in an invalid application for review of the non-reviewable order of the appellate court suffice to pose the issue, much less with "fair precision." Equally clearly, the raising of this argument some 31 years after the perjury and nearly 29 years after the Appellate Division's 1953 affirmance could hardly be satisfactory to any standard of "due time."

Since there is no suitable jurisdictional basis, *certiorari* must be denied.

C. New York's Denial of the Coram Nobis Writ Rests On Adequate State Grounds

Petitioner moved for a new trial herein on February 16, 1981, some 29 years after the rendering of his conviction for perjury and nearly 27 years after his conviction was affirmed on appeal.* State Supreme Court Justice Booth denied this petition, with an opinion noting that two of petitioner's claims were adjudicated on his 1954 *coram nobis* and that, in any case, his perjury conviction could not be affected by the validity of his immunity claim (Appellant's Appendix H). The Court also

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* Petitioner never sought leave to appeal his conviction to the New York Court of Appeals, nor did he seek *any* appellate review of his original *coram nobis* petition (Appellant's Appendix N), denied March 12, 1954 (Appellant's Appendix M).

noted petitioner's unjustifiable failure to raise his claims in the 27 years since his first petition for a new trial, N.Y.C.P.L. § 440.10(2)(c). The State Appellate Division declined to further review this matter.

New York's pointed denial of the petitioner's application nearly 30 years after his conviction rests on adequate state procedural grounds, and this Court properly declines to review such state court judgments. *Henry* v. *Mississippi*, 379 U.S. 443, 446 (1965). Most clearly, New York provides adequate procedures to challenge convictions both on appeal, New York Criminal Procedure Law Article §§ 450, 470, and on motion for a new trial, (*coram nobis*), N.Y.C.P.L. § 440.10. The failure of the petitioner to raise his challenge in a timely fashion, or to present it in the manner now claimed, to the State Supreme Court or to the State Appellate Division some 28 years after conviction, is a sufficient basis to justify the denial of this petition for *certiorari*. This Court has observed:

> Review by [the Supreme Court] of State actions expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction.

Cupp v. *Naughten*, 414 U.S. 141, 149 (1973), *citing McNabb* v. *United States*, 318 U.S. 332, 340 (1943). New York C.P.L. § 440.10(2)(c) provides that a motion for a new trial must be denied where the defendant unjustifiably fails to raise an issue on an appeal actually taken.*

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* N.Y.C.P.L. § 440.10(2)(c) provides:

(c) Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the

[Footnote continued on following page]

Petitioner's direct appeal never raised a challenge to his waiver of immunity. Similarly, N.Y.C.P.L. § 440.10(3)(b) permits the Court to deny a motion to vacate (*i.e. coram nobis*) where the ground was determined on the merits of a p rior motion,* unless there has been an intervening retroactive change in the law. Furthermore, any contention that *Gardner* v. *Broderick*, *supra*, represents such a retroactive charge has no relevance to N.Y.C.P.L. § 440.10(2)(c), and has no real significance here because petitioner in no way contended that the section of the City Charter was then *unconstitutional*, see also N.Y.C.P.L. § 440.10(3)(c).** Petitioner's failure to pursue the avenues of appeal and review open to him after his conviction, furnishes sufficient basis for denial of his present claim. New York has provided adequate procedures to its defendants and prisoners to enable them to pose all Constitutional and substantive challenges to their convictions. Petitioner's failure in the 29 years since his conviction to raise this challenge justfies denial of *coram nobis* relief and mandates denial of the wrti of *certiorari*.

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ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him;

* New York C.P.L. § 440.10(3)(b) provides:

(b) The ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state other than an appeal from the judgment, or upon a motion or proceeding in a federal court; unless since the time of such determination there has been a retroactively effective change in the law controlling such issue;

** N.Y.C.P.L. § 440.10(3)(c) permits denial when:

(c) Upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.

CONCLUSION

For the aforementioned reasons, it is requested that the petition for Certiorari be denied.

Dated: March, 1982
Brooklyn, New York

Respectfully submitted,

ELIZABETH HOLTZMAN
District Attorney
Kings County
Brooklyn, New York

BARBARA D. UNDERWOOD
MICHAEL GORE
Assistant District Attorneys
Of Counsel